EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(2)

001203 DEC 28 2000

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

CHRISTOPHER PAUL CASSELL, M.D.,
Petitioner,

v.

PAUL KURILY; DELORES KURILY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

---

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

---

*THOMAS J. BUDZYNSKI
THOMAS J. BUDZYNSKI, P.C.
43777 Groesbeck Highway
Clinton, MI 48036

(810) 463-5253

Attorney for Petitioner
Counsel of Record

January, 2001

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

Table of Appendix Contents

UNITED STATES BANKRUPTCY COURT FILINGS:

Order Granting Creditor's
Motion to Dismiss
With Prejudice,
filed 1/6/99 . . . . . A1-A69

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
CHRISTOPHER PAUL CASSELL, M.D.
Debtor./

Case No. 97-55209-WS
Chapter 7
Hon. Walter Shapero

ORDER GRANTING CREDITORS PAUL AND DOLORES KURILY'S MOTION TO DISMISS WITH PREJUDICE

This matter having come before the Court on Paul and Dolores Kurily's motion to dismiss Debtor's bankruptcy petition with prejudice for lack of good faith pursuant to 11 U.S.C. § 707(a), and the Court having rendered a contemporaneous opinion GRANTING the Kurily's motion,

IT IS HEREBY ORDERED that Debtor's bankruptcy petition is dismissed;

IT IS FURTHER ORDERED that Debtor is barred from refiling for 180 days from the date of this order, unless previous to that time Debtor can bear the burden of proving a substantial change in circumstances.

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge

Dated: JAN 6 1999

cc: David M. Black
Sommers, Schwartz, Silver & Schwartz, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075-1100

Thomas J. Budzynski
Thomas J. Budzynski, P.C.
43777 Groesbeck
Clinton Township, MI 48036

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
CHRISTOPHER PAUL CASSELL, M.D.
Debtor./

Case No. 97-55209-WS
Chapter 7
Hon. Walter Shapero

ORDER GRANTING CREDITORS PAUL AND DOLORES KURILY'S MOTION TO DISMISS WITH PREJUDICE

I. Introduction

Before the Court is a motion for dismissal of Debtor's Chapter 7 bankruptcy petition. Debtor's principal unsecured creditors are movants Paul and Dolores Kurily, ("the Kurilys") who base their motion on 11 U.S.C. § 707(a). The Kurilys are malpractice judgment creditors and argue that a dismissal for cause and with prejudice is

proper, based on Debtor's lack of good faith. The Court held an evidentiary hearing on this matter. Many of the salient facts were stipulated to incident to or as part of the Joint Final Pre-Trial Order. For the reasons set forth below, the Court grants the motion.

II. Statement of Facts

A. The State Court Judgment

Debtor is a forty-six year old board-certified general surgeon. He has been in private practice for twenty years, the past fifteen as a sole practitioner. He currently has staff privileges at two area hospitals, which means that he is entitled to admit and treat patients there, using hospital operating facilities, and to receive referrals from or consult for other doctors working there. Debtor testified that his patients come pri-

marily from referrals, accounting for roughly 90-95% of his income. The balance comes from being on call to handle emergency surgery. Prior to the malpractice judgment, Debtor was on call at three hospitals. Currently he is on call at one hospital. He clarified that he is not compensated for most on call surgery because those patients often do not have medical insurance. He operates and accounts for his practice on a cash basis. He receives his income from third party payers, usually insurance companies, that reimburse him for his surgical services, in varying amounts over which he has no control.

For approximately two years in 1990 and 1991, Debtor did not carry medical malpractice insurance. He stipulated that his decision not to

carry insurance was because of the high cost. He testified that the medical insurance industry in Michigan at that time was in disarray and $100,000 in coverage cost $40,000 with a $10,000 deductible. During this period, Debtor continued to see and treat patients, Mr. Kurily among them. The Kurilys later sued Debtor for medical malpractice in Macomb County Circuit Court. Prior to trial, Debtor turned down a proposed mediation award of $100,000, which the Kurilys had accepted. The case went to trial and the jury found in favor of the Kurilys for $240,000 on June 25, 1996. When a judgment is greater than the mediation settlement amount, Michigan law allows the prevailing side to seek costs. The Kurilys did so and the state

court awarded costs. Debtor did not appeal the judgment.

To enforce their judgment, the Kurilys served writs of garnishments on certain health insurance companies that reimburse Debtor. On July 17, 1996, roughly $18,310 was collected pursuant to the writs. These funds are presently being held in escrow by the trustee. Debtor testified that the garnishments had an immediate impact on his ability to run his practice, effectively stripping him of any cash flow. On July 29, 1996, Debtor filed his first voluntary petition for relief under Chapter 7.

B. The First Petition for Relief

At the initial § 341 hearing, Debtor testified that he filed in response to the malpractice judgment collection efforts. He fur-

ther stated that he had made no effort to pay the Kurilys and had no intention to do so. During the pendency of his Chapter 7 case, Debtor had testified that he was receiving payments for pre-petition services and was using them to pay for post-petition expenses. He had not claimed accounts receivable from his surgical practice as an asset on his schedules, and thus he had claimed no exemption for them. The Chapter 7 trustee moved for turnover of property of the estate (the accounts receivables and proceeds), on October 11, 1996, and initiated an adversary proceeding against Debtor on this issue on October 25, 1996. The trustee alleged in his complaint that the receivables were property of the estate and requested that the Court compel Debtor to turnover this and

any other non-exempt property. Prior to the hearing on the trustee's motion, (scheduled for November 21, 1996), Debtor filed a notice of conversion from Chapter 7 to Chapter 13, upon which the Court entered an order converting the case on November 4, 1996, thus in effect mooting the trustee's adversary proceeding.

The Kurily's claim was the only unsecured claim of any kind listed in Debtor's Chapter 13 plan. The plan estimated that a total of $21,488 in disposable income over a thirty-six month period would be available to be paid on this claim. The Chapter 13 case was short lived as the Kurilys quickly filed a motion to dismiss the case on eligibility grounds under 11 U.S.C. § 109(e). They alleged that Debtor's non-contingent, liquidated, unse-

cured debts exceeded the statutory limit of $250,000. At that time, with costs, fees and accrued interest, the judgment totaled approximately $375,274. After a hearing, this Court granted the motion to dismiss on December 17, 1996, holding that Debtor was ineligible to be a debtor under Chapter 13. That order was appealed to U.S. District Court for the Eastern District of Michigan, which entered an order affirming the dismissal on April 21, 1997. Debtor had also moved for a stay pending that appeal. During the evidentiary hearing on the stay motion, Debtor again testified about his motive for filing bankruptcy. When asked if he had made any payments to the Kurilys or intended to do so, he answered "No. That's why I filed bankruptcy."

C. The Second Petition for Relief

Debtor filed his second Chapter 7 petition for relief, which is the subject of this opinion, on September 12, 1997. A hearing had been scheduled for September 15, 1997 in state court on the Kurily's motion to add costs to their judgment, filed following the dismissal of the Chapter 13 case. The Kurilys have again moved to dismiss,[1] and the trustee concurs with their motion.

The Kurilys again are the only unsecured creditors of note. Debtor's Schedule F lists two other unsecured claims. An unknown amount is owed GMAC for a"repo deficiency." Debtor testified that GMAC demanded payment of $10,000 after

---

[1]In addition, the Kurilys have filed an adversary proceeding contesting the dischargeability of the debt.

selling a Cadillac that he had leased and turned in. There was no testimony or evidence as to a final determination of the amount of this claim. Debtor owes the second creditor, his attorney in the malpractice trial, $5,000. At the hearing, Debtor stated "I think the Kurilys were my only creditor, ever," and he "always" pays his bills as they become due. The parties stipulated that Debtor pays all business bills and credit card debts monthly.

Evidence as to Debtor's interest in real property and any liens against such property is somewhat confusing. Schedule A lists only his home in Grosse Pointe, with a value of $500,000 and a $65,000 secured lien. The house was valued at $508,000 based on a six or seven year old appraisal. Debtor owns that property jointly with his wife

and he claims a $435,000 exemption. The lien is a home equity loan, the proceeds of which were used, in large part, to purchase a condominium in Ann Arbor approximately six to seven years ago. Debtor testified that condominium is worth between $65,000 and $70,000, and was purchased for use by his son while attending the University of Michigan. He further testified that the property is titled solely in his wife's name for estate planning purposes and it is currently being rented to third parties. As there is no mortgage balance on that property, the maintenance fees, upkeep and taxes are paid out of his earnings and the rental income. Debtor continues to pay the home equity loan that funded the purchase at a rate of $1,210 monthly.

Debtor also testified that he and his wife purchased a second condominium about eleven years ago. This property, which he estimated was presently worth $110,000, is located in Grosse Pointe, Michigan, and was purchased to provide a home for Debtor's widowed mother. That property is also titled in his wife's name. The mortgage balance, according to Debtor's testimony, is between $20,000 and $30,000, and he makes the $736 monthly mortgage payment from his earnings.

Debtor lists $313,200 in personal property in Schedule B. The majority of this represents his interest in a 401(k) account that Debtor testified was a qualified profit sharing pension plan. Its value is listed at approximately $285,000 in the schedules, but Debtor testified that it was then

worth about $330,000. Schedule C exempts the listed value of $285,000. Other personalty listed included cash ($100), clothing ($3,000 with a claimed exemption of $3,000), accounts receivable ($20,000 with a claimed exemption for $20,000) and office equipment ($1,000 with a full exemption claimed). Listed as "unknown" were household goods and furnishings (listed in previous schedules as worth $5,000); books, pictures, art, collections; sports and hobby equipment; and inventory.

Prior to this filing, Debtor owned Jeep and Mustang automobiles and leased a Cadillac and a Blazer. Debtor rejected the lease for the Cadillac during the first Chapter 7 case and subsequently sold the Jeep

and Mustang[2]. He replaced these vehicles with a leased BMW and a Mercury Sable. He has reaffirmed the lease on the BMW, for $733 per month, and pre-paid the $9,288 lease for the Sable. According to his testimony, this pre-payment was necessary because the bank denied him financing for the lease. The record is unclear as to what happened to the Blazer, although it does not appear on the schedules incident to the current filing.

The parties stipulated that Debtor failed to list a $500,000 life insurance policy that names his Revocable Living Trust as the

---

[2]Debtor had borrowed 80% of the value of the vehicles just prior to the first filing. He testified that the garnishments had left him without any income to continue his practice, and the loans were intended to enable him to keep the business afloat.

beneficiary, and he failed to list any interest in that Trust as an asset in his initial Chapter 7 schedules, although it is not clear what are the assets of that Trust, if any. Debtor testified to this matter during an evidentiary hearing held on January 16, 1997, relating to his motion for stay pending appeal of the dismissal of his first bankruptcy case. He reasoned that, with no value, he did not need to list this asset. Counsel stipulated at that time that the interest was not listed. The life insurance policy and Trust were again absent from the schedules in the instant filing.

The listed Schedule J current monthly expenses are:

Mortgage payment ($1,210 for the home equity loan (for the Ann Arbor condominium) and $736 for his mother's condominium)	$ 1,946
Utilities	$ 561
Home maintenance	$ 250
Food	$ 710
Clothing	$ 400
Medical/dental	$ 300
Transportation	$ 100
Recreation	$ 200
Charitable contributions	$ 700
Insurance (includes $780 for health and disability)	$ 1,367
Taxes including real estate	$ 4,287
Auto installment	$ 738
Office expenses	$17,000
Children's college	$ 500
Total	$29,059

The food budget is for Debtor, his wife and two children. It includes dining out for one meal per week. Debtor testified that he contributes to his church and has been as generous as possible for years. The parties stipulated that

office expenses have remained relatively constant at around $11,000 to $12,000 a month for ten years. Debtor's schedules showed an increase in such from roughly $12,000 to $17,000 from first to second filing. The parties stipulated that Debtor thought the $17,000 figure was a typographical error. There is no detailed listing, as required, in any of the three sets of schedules nor has he amended his schedules to confirm this. Expenses for college decreased from $2,500 per month listed in his prior schedules. Debtor has assisted his children with both undergraduate and graduate education. Currently no child is attending college, but at the May, 1998 hearing, he testified that his youngest child will be in college next year.

The stipulated facts included the fact that Debtor took six vacations trips in 1996, including to Kansas City, Shanty Creek, Idaho and the Cayman Islands. Mrs. Cassell accompanied him for some of these trips. Debtor took similar trips in 1997, including a two-week African safari. Debtor clarified in his testimony that the trip to Kansas City was to visit a brother who was recovering from a heart attack; the Idaho trip was for elk hunting with his daughter; and the African safari cost $4,000 to $5,000, which he said was "surprisingly inexpensive." He also stated that he recently had attended a medical conference in the Cayman Islands for one week, staying a second week for vacation.

At the evidentiary hearing, the evidence consisted of the testimony

of two expert witnesses (one for each side), and Debtor. The expert witnesses testified as to Debtors s income and expenses. The Court initially notes that the parties stipulated that Debtor's gross monthly income from his practice is $29,500. Debtor's witness, Mr. Umlauf analyzed income and expenses for Debtor's practice for the years 1990 through 1997. He used the figures from IRS Schedule C, attached to Debtor's joint federal income tax return. Umlauf did not review any underlying documentation, nor did he compare these expenses with those listed on bankruptcy Schedule J. Umlauf testified that the income came primarily from the surgical practice, with a small amount from interest and dividends. He also stated that Debtor reported rental income from

the Ann Arbor condominium, but testified that the property incurred a net loss, which Debtor paid out of his medical practice earnings. Debtor does all of his own accounting, including preparing his tax returns and withholding employment tax returns covering his staff. Umlauf found him to be "very organized" and "very knowledgeable."

Umlauf calculated that Debtor's weighted average income over the indicated seven year period was $280,000, decreased to about $275,000 when adjusted for tax refunds. He further testified that Debtor's income had been increasing annually to a high of $354,000 in 1995, with a net of $209,000 after business expenses. He noted that the practice income had fallen "dramatically" since then. He theo-

rized that this was a result of a reduction in referrals and a decrease in the amount reimbursed by insurance companies. On cross-examination, the Kurilys noted that Debtor stipulated that he had voluntarily ceased being on call and taking new patients for a period of time, and that this was the cause of the reduction in his income. Debtor testified that the reduction was voluntary and only lasted for about three months. He stated that the reason for his temporary reduction was the stress from trial and he did not believe that it caused the decline in his income, as he is not compensated for most on call surgery. Umlauf calculated that weighted average annual business expenses were $121,000. Umlauf testified that business expenses had been $129,000 in 1996

and $144,500 in 1997. Apparently expenses have increased in recent years because of legal fees in defending the malpractice suit and prosecuting the bankruptcy cases. Umlauf stated that legal expenses were $7,443 in 1996 and $8,093 in 1997. Even at the annual high of $144,500 ($12,042 monthly), these expense numbers show that there likely was a typographical error in Schedule J, and the correct figure for office expenses should be $12,000 monthly and not the $17,000 listed. Thus, Umlauf calculated that Debtor's net weighted average income was $154,000. Umlauf stated that the amount was $155,000, but the Court believes that $154,000 is the correct number ($275,000 income

less $121,000 in business expenses).[3]

The Kurily's expert witness, Mr. Conway, reviewed Debtor's personal and business financial records from approximately 1990 through 1997, including tax returns, bank statements, check registers and canceled checks. He noted two difficulties due to a lack of documentation supporting disbursements: 1) there is no record as to what criteria Debtor

---

[3]Umlauf noted that Debtor had been audited by the IRS in 1996. Umlauf testified that the IRS made only minor changes to income and office expenses, and a "substantial adjustment" to rental income from the Grosse Pointe condominium, but did not explain whether the change was up or down. As the IRS did not open up prior or subsequent years for further review, he concluded that the audit was "clean," and characterized the results as a "no change" audit.

used to determine whether any given expense was to be listed as business or personal; and 2) looking only at canceled checks, Conway could not determine whether they were categorized as business or personal. Thus he could make no determination as to the accuracy or legitimacy of expenses. Conway also analyzed Debtor's ongoing financial situation. He examined income and expenses over a three year period to determine if there was "discretionary cash flow," which he defined as income after business expenses and reasonable living expenses. Conway recalculated net income starting with the average amount stated in federal tax Schedule C. He then adjusted this figure upward by adding back in amounts that had been listed as business expenses, but were most likely of a

personal nature[4]. To adjust expenses, Conway started with the listed expenses in bankruptcy Schedule J, and subtracted "discretionary" expenses[5]. Finally, subtracting the adjusted reasonable household expenses from the adjust-

---

[4]For example, Conway added in payments to "Bernie's Gems" that were listed as business expenses. He also reduced legal and professional service expenses. As Debtor does his own accounting, most of these expenses would be for legal services. Conway reasoned that once the bankruptcy case and this motion to dismiss are resolved, there should be a reduction in legal expenses.

[5]The majority of the expenses that Conway thought were discretionary were payments for the Ann Arbor condominium (funded by the home equity loan), charity and college. Evidently, Conway was using the schedules from the Chapter 13 case in evaluating expenses. College expenses had been listed at $2,500 monthly. The current Chapter 7 schedules list the much lower amount of $500 per month.

ed net income, Conway concluded that Debtor had discretionary income in the amount of $60,021 per year. Thus, according to his calculations, Debtor could pay all his business expenses, pay his household expenses and still have slightly more than $60,000 per year to spend as he wished.

Shortly before the May, 1998 evidentiary hearing, at the suggestion of the Court, the parties submitted this matter to mediation. The mediation was unsuccessful. As the parties indicated to the Court that they had been pressed for time in the mediation with the evidentiary hearing fast approaching, the Court and the parties thought that further mediation might yet possibly resolve this matter. The Court ordered a second mediation, this time before a Bankruptcy judge, but

that effort also, unfortunately, was unsuccessful. Therefore, the Court was required to and has considered the evidence and reached its conclusion.

III. Discussion

A. Burden of Proof

There was some initial discussion at the evidentiary hearing as to which party bears the ultimate burden of proof in a § 707(a) action. The Court held at that time and affirms that the Debtor has the ultimate burden of proof The Kurilys made out a prima facie case on the pleadings, and especially, the stipulated facts in the Joint Pretrial Order. The Court further held and reaffirms that Debtor has the burden of rebuttal and the ultimate burden of proof *See In re Bingham*, 68 B.R. 933, 935 (Bankr. M.D. Pa. 1987) ("[O]nce the

debtor's good faith has been put into question, the debtor bears the burden of proving that the filing was made in good faith."), *cited with approval in Industrial Ins. Serv. v. Zick (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir. 1991).

B. Dismissal for Cause and the "Smell Test"

A court may dismiss a case under 11 U.S.C. § 707(a) "only after notice and a hearing and only for cause." 11 U.S.C.A. § 707(a) (West 1993). Section 707(a) lists three examples of "cause": unreasonable delay, nonpayment of fees and failure to file schedules and statements. These examples are intended to be non-exclusive illustrations of "cause." *See Zick*, 931 F.2d at 1126. This section differs from § 707(b), which is limited to a motion by the court or trustee

for dismissal for "substantial abuse" by a debtor with primarily consumer debts. Debtor is correct in noting that the two subsections are distinct and the ability to repay debts may constitute substantial abuse under § 707(b), but alone, cannot constitute cause under § 707(a). *See In re Bridges*, 135 B.R. 36, 37-3 8 (Bankr. E.D. Ky. 1991). However, bad faith can constitute cause. *See Zick*, 931 F.2d at 1127.

To determine whether a debtor has acted in bad faith, the *Zick* court relied on what has been termed the "smell test." *Id.* at 1127-28. The smell test is a collection of factors that indicate bad faith, which the Court must review under the totality of the circumstances. *See In re Spagnolia*,

199 B.R. 362, 365 (Bankr. W.D. Ky. 1995). The factors include:

1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition.
2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle.
3. The debtor filed the case in response to a judgment[,] pending litigation, or collection action; there is an intent to avoid a large single debt.
4. The debtor made no effort to repay his debts.
5. The unfairness of the use of Chapter 7.
6. The debtor has sufficient resources to pay his debts.
7. The debtor is paying debts to insiders.
8. The schedules inflate expenses to disguise financial well-being.
9. The debtor transferred assets.
10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors.
11. The debtor employed a deliberate and persistent pattern of

evading a single major creditor.

12. The debtor failed to make candid and full disclosure.
13. The debts are modest in relation to assets and income.
14. There are multiple bankruptcy filings or other procedural "gymnastics."

Id. at 365 (citations omitted). The *Zick* court further clarified that a

> [d]ismissal based on lack of good faith must be undertaken on an *ad hoc* basis.... It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.

Zick, 931 F.2d at 1129 (citation omitted). In *Zick*, the debtor had

intentionally breached a non-competiton agreement. The debtor filed for relief nine days after a consent judgment. The bankruptcy court based its finding of bad faith on the debtor's manipulations in reducing his creditors to a single creditor, his "failure to make significant lifestyle adjustment," his lack of efforts to repay the debt, his filing in response to a mediation award, and the unfairness of the debtor's use of Chapter 7 in these circumstances. *Id.* at 1128. The Sixth Circuit found these factors sufficient to support a finding of bad faith. *Id.*

C. Application of the Zick Factors

The Court finds that Debtor did not sustain the ultimate burden of proof on a number of factors.

1. Reduction of Creditors to Single Creditor

Debtor argues that this factor is inapplicable as he made no efforts to reduce his creditors just prior to filing for bankruptcy. The Court acknowledges that this is true. However, the Court also votes that such efforts were unnecessary because Debtor admittedly had only one creditor: the Kurilys. Debtor testified and stipulated that he has always and continues to pay both his personal and business debts as they become due, except for the Kurilys' judgment. He stated that "I think the Kurilys were my only creditor, ever."

The reason that a debtor paying off certain creditors pre-petition is a badge of bad faith is that by such manipulations, a debtor favors some creditors while disfavoring others. This is contrary to the central premise of bankruptcy - the

orderly and fair distribution of a debtor's assets in a common forum. That is precisely what Debtor has attempted to circumvent. The fact that he had no other creditors to pay off does not negate the result that, by his deliberate pre-petition actions, he has only one creditor that would be affected by his bankruptcy.

2. Continuing a Lavish Lifestyle or Failing to Make Lifestyle Adjustments

There was a fair amount of evidence as to Debtor's lifestyle, and whether or not it was "lavish." Doubtless, for many Chapter 7 debtors appearing before this Court, he has what some may view as an enviable lifestyle. However, for a general surgeon in private practice as a sole practitioner, and as a man who worked throughout his stud-

ies at medical school and who contributes substantially to the support of his widowed mother, the Court is not prepared to call Debtor's lifestyle "lavish," yet the Court's analysis does not end here.

The *Zick* court notes that a debtor's "attempt[] to preserve a comfortable standard of living at the expense of [his] creditors" is not intended to be protected by the Bankruptcy Code. *Zick*, 931 F.2d at 1129 (quoting *In re Jones*, 114 B.R. 917, 926 (Bankr. N.D. Ohio)) (emphasis added). The Code seeks to assist the truly needy. It "'is intended to serve those who, despite their best efforts, find themselves hopelessly adrift in a sea of debt."' *Id.* (quoting *Jones* at 926). It is a badge of bad faith to seek the protection of bankrupt-

cy without being prepared to make some sacrifices. This is supported by the second part of this factor - that the debtor has made no adjustments to his lifestyle. Changes to lifestyle show a willingness to sacrifice in order to fulfill one's credit obligations.

Applied to Debtor, the evidence leaves little room for argument. First and foremost, the parties stipulated that "Dr. Cassell's lifestyle has not changed for the past several years." Testifying at the hearing on his motion to stay pending appeal, Debtor was asked "What have you done to reduce your expenses?" He answered, "I don't remember specifically." It is likely that he could not remember because there had been no reduction. During cross-examination at the evidentiary hearing, Debtor charac-

terized his lifestyle as "frugal" and explained that he had made no effort to reduce his lifestyle because there was "not anything I can reduce." The Court need not, nor is the Court convinced that it ought to, scrutinize individual expenses on Debtor's Schedule J. However, the Court need only look to the stipulated facts to determine that changes in lifestyle were possible: an elk hunting trip in Idaho with his daughter in 1996, an African safari with his brother in 1997 and a recent one-week vacation in the Cayman Islands. His statement that there is nothing he can do to reduce his expenses is at odds with these facts. This indicates a lack of good faith. In a creative argument, Debtor contends that the Kurilys want to preserve their "lavish lifestyle" at

Debtor's expense and characterizes them as "greedy." Not surprisingly, this assertion is unaccompanied by a citation to authority as to the relevance of a creditor's lifestyle in a matter such as this.

3. Filing in Response to Collection Action: Intent to Avoid a Large Single Debt

Stipulated fact (6) states that "Dr. Cassell admits that he filed his first Chapter 7 bankruptcy in response to the Judgment, and that he had made no effort to pay the Kurilys, and had no intention of ever paying them." Stipulated facts (14)(E) and (F) reiterate that Debtor's reason for filing was the Kurily's judgment against him and that he has no intent to pay them. In his testimony at the evidentiary hearing, he was asked three times on cross-examination

whether it was true that he filed in response to the judgment and that he had no intent to pay. He answered "In my opinion they deserve nothing from me." He also answered, "Well, I think that's part of the bankruptcy -- is to avoid paying that."

As noted, after the dismissal of the converted Chapter 13 case, the Kurilys attempted to pursue their rights in state court; they moved to add the costs that they incurred in challenging the bankruptcy petition to their judgment. With a hearing scheduled on Monday, September 15, 1997, Debtor filed his second Chapter 7 on Friday, September 12, 1997. This was clearly another attempt to use bankruptcy to avoid collection action.

4. No Effort Made to Repay the Debt

In his testimony, Debtor asserted that he had made "multiple attempts" to "pay" the debt owed to the Kurily's. Evidently, he was referring to some settlement negotiations in state court that the parties had engaged in. There appears to be no evidence of actual payments other than what emanated from the garnishments. The Kurilys objected that this testimony would be inadmissible as offers to settle under Federal Rule of Evidence 408. The Court sustained their objection and did not allow this testimony.

Debtor also testified that he had made payments to the Chapter 13 trustee during his short-lived Chapter 13 case. The trustee's final report shows a total of $510.00 paid into the plan. This represents two scheduled monthly payments of $255.00. Because the

petition was dismissed before confirmation, no payments were disbursed to creditors and the trustee refunded the $510 to Debtor. The Court questions his good faith here in two respects. First, in closing arguments, counsel for Debtor argued that filing a Chapter 13 petition was an indication of good faith and implied that the only reason for so filing would be because of an intent to pay creditors. However, his motive in converting from Chapter 7 to Chapter 13 raises questions. He converted prior to an evidentiary hearing on the Chapter 7 trustee's motion for immediate turnover of non-exempt assets. The trustee was pursuing the same income, on behalf of the estate, that the Kurilys sought to garnish. Rather than being a serious attempt to make good on his

debt to the Kurilys, his conversion would seem to have been precipitated by the trustee's actions in recovering property of the estate, i.e. the receivables that Debtor earned pre-petition and was using for post-petition expenses. The Court cannot conclude, in light of the timing of the conversion and Debtor's repeated assertions of his intent not to pay, that the Chapter 13 filing indicates his good faith. Second, the Chapter 13 plan called for a total of $21,488 to be paid over three years on the Kurily's claim that, by that time, was estimated to be $375,274. Without more thoroughly analyzing Debtor's disposable income, the Court simply notes that he is willing to give more to charity than to the Kurilys. (At $700 per month, the plan called for a total of $25,200

over the three year period in charitable expenses.) The Court cannot agree with Debtor's assertion that these two payments to the Chapter 13 trustee constituted his best efforts to repay the debt. Although he made a minimal effort to repay the debt, it is so negligible and was likely made under pressure of the trustee's pending actions, as to be no effort in the Court's view.

5. Unfairness of the Use of Chapter 7

Debtor stipulated that his reason for his lack of medical malpractice insurance during the period indicated was the expense. Granted, $40,000 for $90,000 in coverage is expensive. Debtor is a sole practitioner who does his own accounting and tax returns. His own expert witness found him to be

"very organized" and "very knowledgeable." Malpractice insurance is a cost of doing business and Debtor carried it for all but two years. For two years, he made a business decision not to carry such insurance. Just as such insurance is a business expense, so is the debt to the Kurily's, which indeed Debtor himself characterized as a "business expense" that resulted from the operation of his surgical practice. He took a calculated business risk and lost, and incident thereto he turned down a $100,000 mediation figure, and failed to appeal a jury award of $240,000. To be sure, bankruptcy can and is designed to be a haven for those who have made bad or irresponsible business or financial decisions that result in little choice other than bankruptcy. That truism, however, does not

preclude inquiry, in the context of a good faith objection, into the nature and character of the circumstances and decisions that brought a particular debtor to that position.

Bankruptcy is intended to help the honest and needy debtor who has failed in his best efforts to repay his debts. *See Zick*, 931 F.2d at 1129 (citation omitted). This record supports a conclusion that Debtor is using his best efforts to avoid paying this debt and is attempting to make the and virtually only the Kurilys bear the responsibility and consequences of his bad business decisions. In the context of this case, bankruptcy court is not the proper forum for him to contest the justness of the state court jury verdict. He cannot decide for himself that the Kurilys

"deserve nothing from" him. If any facts illustrate an unfair use of Chapter 7, it is these.

6. Sufficient Resources to Pay the Debt

As Debtor correctly notes, the Court must be careful not to rely too heavily on this factor and thus turn a § 707(a) for cause motion into a § 707(b) substantial abuse motion. However, sufficiency of resources is a factor that must be addressed and weighed in balance with all the other factors. The Court concludes that Debtor has not met his burden of proof that he has insufficient resources to pay his debts.

The Kurily's expert witness testified mostly as to expenses. The problem with his analysis is that he was using expenses listed on schedules from the prior Chapter

13 case, and not the current Chapter 7 filing. Debtor's expert testified as to a weighted average income and business expenses, but did not testify as to household expenses. This testimony aside, the parties stipulated that Debtor's monthly gross income from his practice is $29,500. The Court reviewed this and other stipulated facts and Debtor's Schedule J to determine whether there were available resources from net income, after deducting both business and household expenses.

Taking Debtor's Schedule J figures at face value with no adjustments for discretionary or inflated expenses, he has total monthly expenses of $29,059 per month. This figure includes the figure of $17,000 for business expenses that the Court has con-

cluded was a typographical error. There was credible evidence that monthly business expenses, at the highest, are $12,000. The correct total monthly expenses thus should be $24,059. Of this, $12,000 is for business and the balance of $ 2,059 for household expenses. Deducting these expenses from the stipulated gross monthly income would leave $5,441 per month after paying both business and household expenses. This totals $65,292 annually in income after paying business and household expenses.[6] By reason

---

[6] $ 29,500 gross monthly income (stipulated)
- 12,000 monthly business expenses
= 17,500 in net income
- 12,059 in household expenses ($24,059 total less $12,000 in business expenses)
= $5,441 balance

thereof, the Court concludes that Debtor has not met his burden of proving that he has insufficient resources to make a good faith effort to pay the Kurilys.

7. Over-Utilization of the Protection of the Code to the Unconscionable Detriment of Creditors

Debtor's argument on this point in essence is that the Kurilys have no need for payment of this debt and will suffer no detriment. He has characterized the Kurilys as "greedy" creditors who wish to "preserve a lavish lifestyle," having won "an oppressive jury verdict" by using the state legal system as a "lottery." Debtor misinterprets the application of this factor.

The unconscionable detriment that the Court must examine is not the impact of non-payment on the

lifestyle of the objecting creditors, but the fact of non-payment itself of a legitimate debt. The fact that Debtor feels that the verdict in favor of the Kurilys was unjust and in his mind the Kurilys "deserve nothing," has no bearing on this Court's determination. The Kurily's lifestyle and their alleged motives also have no bearing on the legitimacy of this debt, which the Court is bound to recognize. The Code is simply not intended to be utilized as a basis for a debtor deciding which creditors "deserve" payment and which do not.

8. Deliberate and Persistent Pattern of Evading a Single Major Creditor

Any argument on this factor must necessarily end with the stipulated fact that "Dr. Cassell has

employed a deliberate and persistent pattern of evading the Kurilys, his single major creditor."

9. Multiple Bankruptcy Filings

Debtor filed a Chapter 7 in July, 1996 in response to garnishments. He converted that to a to Chapter 13 case when faced with the trustee's motion for turnover of assets. The instant case was also apparently in response to anticipated accelerated collection efforts by the Kurilys, made evident when they filed a motion in state court to add costs. These facts indicate, and the Court concludes that this factor weighs against Debtor.

10. Other Factors

The Kurilys argue that other smell test factors indicate bad

faith on the part of Debtor. They allege that he had paid insiders and had transferred assets pre-petition. These allegations relate primarily to ownership of the condominiums. The Cassells purchased the Grosse Pointe condominium approximately eleven years ago in order to provide a home for Debtor's widowed mother. The Court cannot conclude that this indicates bad faith, given the time of the purchase and the purpose. The Cassells purchased the Ann Arbor condominium for their children to use while in college to save rooming expenses. It was titled in Mrs. Cassell's name for estate planning purposes. Although the Court notes that this took place around the same time as when Debtor did not have medical malpractice insurance, there is no indication that this

was an attempt to hide assets for the purpose of a bankruptcy filing years in the future.

The Kurilys also allege that Debtor inflated his expenses and failed to make a full and candid disclosure. The discrepancy as to office expenses appears to be an honest error. The Kurilys allege that Debtor failed to list assets, but he testified that if he did so, it was because he thought they had no value. Although the trustee, not the debtor, should make this determination, the Court is not convinced that what is in this record provides evidence of bad faith.

Debtor's arguments are twofold. First he states that the Kurilys, as creditors and parties in interest, lack standing to bring a motion for substantial abuse, and, further, the debt at issue is

not a consumer debt. Debtor confuses § 707(b) with the motion at issue under § 707(a). The standing and debt requirements that he cites apply to § 707(b), dismissal for substantial abuse, and not § 707(a), dismissal for cause.

Second, Debtor finds support in *In re Zick*. The Sixth Circuit in *Zick* cites three of the smell test factors: "concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." *Zick*, 931 F.2d at 1129. Debtor seems to reason that, because the debt that he owes the Kurilys stems from his ordinary (and not gross) negligent conduct and would likely be dischargeable

under *Kawaauhau v. Geiger*, ____ U.S.___, 118 S. Ct. 974 (1998), this necessarily means that he has filed in good faith. However, Debtor must first convince the Court that he is eligible for the protections of the Code. In other words, before receiving the benefit of a discharge, the Court must first determine that Debtor has met the fundamental requirement of good faith.

The three factors listed by the court in *Zick* are significant for a finding of bad faith; and were sufficient given the facts in that case. However, the *Zick* court qualified its use of these three factors, stating that dismissal for lack of good faith "is *generally* utilized only in those egregious cases that entail" the three factors. *Zick*, 931 F.2d at 1129 (em-

phasis added). The court did not hold that dismissal based on bad faith was available *only* when the three factors were present. This Court believes that this reading would be contrary to the Sixth Circuit's directive that the Court must examine alleged bad faith under the totality of the circumstances. *See Hardin v. Caldwell (In re Caldwell*, 851 F.2d 852, 860 (6th Cir. 1988) (analyzing a Chapter 13 debtor's good faith). Debtor's lack of concealment or misrepresentation and a debt based on ordinary negligent conduct are sufficiently outweighed by his meeting nine other factors, to wit: manipulation to reduce creditors to a sole creditor, no adjustments in lifestyle, filing in response to collection efforts, no effort to pay, unfairness of his use of Chapter 7, suf-

ficient resources, over utilization of the protection of the Code to the unconscionable detriment of creditors, a deliberate and persistent pattern of evading a single major creditor and multiple filings.

Debtor also cites *Buck v. Buck (In re Buck)*, 166 B.R. 106 (Bankr. M.D. Tenn. 1993) for support of his reading of *Zick* and his argument that facing garnishments for a malpractice judgment is a legitimate reason for filing bankruptcy. In *Buck*, a creditor moved for dismissal for bad faith under § 707(a). The court concluded that "the debtor had legitimate and justifiable reasons for filing Chapter 7, and thus filed in good faith." *Id.* at 110. The court did not apply the smell test factors. Instead, the court applied the

three factors from *Zick*, finding insufficient evidence of misrepresentation, concealment or conduct akin to fraud or gross negligence. Further, the court did not find the debtor's lifestyle to be lavish or expenses excessive. *See Id.* The court did acknowledge evidence of the debtor attempting to avoid a single debt. *See Id.* at 109.

This Court disagrees with the *Buck* court's analysis. The *Buck* court limited its analysis to the three "most egregious" factors stressed by the *Zick* court, and seemed to read *Zick* as limiting bad faith to these three factors. This Court reads the *Zick* court's emphasis on these factors as instructive, but with no intent that they be the exclusive factors for a finding of bad faith. The *Zick* court stated that bad faith dis-

missal is "generally utilized only in those egregious cases." *Zick*, 931 F.2d at 1129. Absent the word "generally," the Court might reach a different conclusion. This Court is not convinced that the Sixth Circuit intended to abandon the smell test in favor of a three-factor test, especially in light of that court's stated approval of the smell test. *See id* at 1127 ("We find particular merit in what is described as the 'smell test'.... ") (citation omitted). Nor does this Court agree that its analysis of good faith must end with a finding of "legitimate and justifiable reasons for filing." *Buck*, 166 B.R. at 110. Again, this would limit the smell test to only one factor. This cannot be squared with what the Court understands is its obligation to methodically

examine a challenged lack of good faith under the totality of the circumstances. The Sixth Circuit has "emphasize[d]... that no list is exhaustive of all the conceivable factors which could be relevant when analyzing a particular debtor's good faith." *Hardin v. Caldwell (In re Caldwell)*, 851 F.2d 852, 860 (6th Cir. 1988) (analyzing a Chapter 13 debtor's good faith). In the instant case, there is significantly more evidence of bad faith, much of it stipulated fact, that would outweigh (under the totality of the circumstances), any lack of evidence of the three factors.

In summary, and restating only the more significant of the myriad of relevant facts, Debtor stipulated that (1) he decided not to carry medical malpractice insurance be-

cause it was too expensive; (2) he has a monthly gross income of $29,500; (3) he has only one major unpaid creditor and has paid and continues to pay all other creditors; (4) he has made no changes to his lifestyle that might show a willingness to sacrifice in order to fulfill his credit obligations; (5) he filed in response to the Kurily's judgment against him and has no intent to pay them; and (6) he has employed a deliberate and persistent pattern of evading the Kurilys, his single major creditor. In addition, the evidence and testimony support the facts that (1) Debtor has sufficient resources to pay, based on stipulated income and expenses according to schedule J; (2) without appealing the Kurily's judgment, he is using bankruptcy as a basis for carrying out his deci-

sion that they deserve nothing from him; (3) his efforts to pay the debt consisted of two Chapter 13 payments, which were so negligible as to be no efforts at all, given his questionable motive and the comparative amounts paid for discretionary expenses; (4) by using the Code, he has been able to avoid the consequences of his business decisions, and instead a legitimate business debt goes unpaid; and (5) he has filed multiple bankruptcy cases, with a strong likelihood, from his testimony, that he will file future petitions in response to collection efforts. The sum total of such compel the Court to conclude that this filing was in bad faith and must be dismissed for cause under 11 U.S.C. § 707(a).

D. Dismissal with Prejudice to Refiling

The Kurilys have requested that the Court dismiss with prejudice. Section 349(a) provides that "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title." 11 U.S.C. § 364(a). A court may, for cause, order that dismissal of a case preclude the debtor from filing subsequent petitions for relief for a set period of time. *See authorities listed in In re Weaver*, 222 B.R. 521, 522 (Bankr. E.D. Va. 1998). Given the facts, particularly Debtor's statements regarding his reason for filing, his statements of his intention not to pay this debt and

his indication that he will respond to future collection efforts by refiling, the Court is convinced that cause exists to impose a bar on refiling.

In effect, Debtor seeks to act as his own state appellate court, having decided that the Kurilys' verdict against him is unfounded and unjust.

> [T]he "[r]equirement of good faith prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes. Moreover, a good faith standard protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons... available only to those debtors... with 'clean hands."'

In re Casse, 219 B.R. 657, 660-6 1 (Bankr. E.D.N.Y. 1998) (quoting *Little Creek Development Co. v. Commonwealth Mortgage Corp. (In re Little Creek Development Co.)*, 779 F.2d 1068, 1072 (5th Cir. 1986)). Debtor's attempted use of the Code to not just delay payment, but to deny payment altogether is a species of "reprehensible purpose," and bars him from the benefits that good faith brings to a court of equity. Accordingly, the Court will bar refiling for 180 days, unless previous to that time Debtor can bear the burden of proving a substantial change in circumstances. *See In re Dyke*, 58 B.R. 714, 715 (Bankr. N.D. Ill. 1986)[7]

---

[7]While mentioned in the recitation of facts in this matter, it should be made clear that the failure of the indicated mediation efforts is

not considered to be of any significance in the Court's conclusion. This would be an inappropriate use of the mediation process. It does, however, give rise to further comment of the Court given the possibility at least of further litigation either in this Court or elsewhere. Both parties in this matter have demonstrated a fair degree of what appears to be illogical intractability, given the high stakes. Debtor has not faced the possibility of this Court's conclusion, which in large measure arises out of the effects of his actions in deciding not to carry medical malpractice insurance and continuing to treat patients, and in not appealing the Kurily's judgment. The Kurilys are not facing the fact that this debt may very well be a dischargeable debt under precedent recently set by the U.S. Supreme Court in Kawaauhau V. Geiger. The Court twice provided the parties with the opportunity to avail themselves of the mediation process. If ever there was a vicious circle, these parties seem to be caught in one, and it likely will not end with this Court's order. It will merely move to another venue where further costly litigation will ensue. Available state court remedies are designed essentially to balance the inescapability of the debt in the

Accordingly, the motion is GRANTED and Debtor's Chapter 7 bankruptcy petition is dismissed with prejudice.

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge

Dated: JAN 6 1999
cc: David M. Black
Sommers, Schwartz, Silver & Schwartz, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075-1100

Thomas J. Budzynski
Thomas J. Budzynski, P.C.
43777 Groesbeck
Clinton Township, MI 48036

---

state court with Debtor's right and ability to continue to carry on his practice and support his family. At some point (a point this Court believes had been reached some time ago) more rationality than has previously been exhibited might hopefully prevail.